IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1262 OF 2007
IN
SUIT NO.3906 OF 1988

Umesh Gajanan Pathak. ..Plaintiff.

V/s.

Sumati Pandurang Pathak & Ors. ..Defendants.

Mr.Saleh Doctor, Sr. Advocate, Mr.Arif Bookwala with Mr.Gautam, Mr. Jaideep Mitra, i/b. M/s. Apte & Co. for plaintiff.

Mr.Jai Chinai, Sr.Advocate a/w. Prakash Shah, Ms.Archana Gupte for defendant No.18.

CORAM: A.M.KHANWILKAR,J

DATE : SEPTEMBER 27, 2007.

P.C. :

1. Heard counsel for the parties.

2. At the hearing of the Motion, counsel for the Defendant No.18 in all fairness submits that the Defendant No.18/applicant will not press reliefs in terms of prayer clause (b),(c) and (d) as the Court is inclined to expedite hearing of the Suit in terms of the order passed today. Accordingly, I am called upon to consider only relief in terms of prayer clause (a) of the Motion. Prayer clause (a) of the Motion reads thus:

"That the preliminary issue to be framed that whether suit be dismissed with costs under Order VII Rule 11 of C.P.C.1908;"

3. According to the Defendant No.18, no cause of action has been made out by the Plaintiff inasmuch as admittedly, the Suit land is leasehold property. Relying on the reported decision of the Constitution Bench of the Apex Court in the case of **Bhagwati Prasad Sah V/s. Bhagwati Prasad Sah[(1964) 5 SCR 105]**, it was argued that there can be no cause of action for institution of the suit by the Plaintiff. On this basis, it is submitted that issue as to whether the plaint should be rejected in terms of Order 7 Rule 11 of C.P.C be framed as preliminary issue and decided in the first place.

4. Counsel for the Plaintiff on the other hand, has resisted this request. According to the Plaintiff, the fact whether the Plaintiff has made out cause of action has been scrutinised by this Court on the earlier occasion. This Court has expressed prima facie opinion which implicitly records the finding that the Plaintiff has made out cause of action for institution of present Suit.

Once such finding is recorded, it will be inappropriate to non-suit the Plaintiff on technical objection taken by the Defendant No.18. To buttress this submission, reliance is placed on the expositions in the case of **Bomi Munchershaw Mistry V/s. Kesharwani Co-op. Housing Society Ltd. & Ors. reported in 1988(3) Bom.C.R.238.** Besides, my attention is invited to Rule 2 of Order 14 of C.P.C.to contend that the question whether cause of action has been made out or not by the Plaintiff is neither an issue of jurisdiction of the Court or issue pertaining to bar of suit created by any law for the time in the course. On the above submission it is contended that although issue as suggested by the Defendant No.18 be framed, but that need not be decided as preliminary issue, but be answered alongwith the other issues at the final hearing of the Suit.

5. Having considered rival submissions, I am in agreement with the stand taken on behalf of the Plaintiff that the issue as to whether the Plaint should be rejected for want of cause of action can be decided with other issues at the hearing of the suit and not as preliminary issue. That objection is not ascribable to the issue of jurisdiction of the Court

or to the bar of suit, as such. In any case, there is already decision of our High Court while considering the application for interim relief taking the view that the Plaintiff had made out prima facie case, which implicitly indicates that there was cause of action for institution of suit. In such a situation the said issue can be decided alongwith other issues at the hearing of suit, which will be consistent with the view expressed by our High Court- in the case of **Bomi Munchershaw Mistry(supra).** Accordingly, relief claimed in the Notice of Motion in terms of prayer clause (a) cannot be acceded.

6. Notice of Motion disposed of on the above terms.

(A.M.KHANWILKAR,J)